FILED

97 . 431 SEP - 2 1997

OFFICE OF THE CLERK

No.

In The

Supreme Court of the United States

October Term, 1996

ERIC LYNN SELF,

Petitioner,

vs.

AUBURN STEEL COMPANY, INC., SUMITOMO CORPORATION OF AMERICA, SC STEEL INVESTMENT, INC. and YAMATO KOGYO (U.S.A.) CORPORATION d/b/a ARKANSAS STEEL ASSOCIATES, an association of partners,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

LARRY J. STEELE
Attorney for Petitioner
P.O. Box 561
Walnut Ridge, Arkansas 72476
(501) 886-5840

40 pp

QUESTION PRESENTED FOR REVIEW

The issue is a question of law and is a case of first impression for this Court.

The issue is whether the Age Discrimination in Employment Act (ADEA) affords an employee standing for retaliation where the employee's father had previously brought an ADEA action against the same employer. The employer has admitted taking certain actions which might be considered adverse against the employee.

PARTIES TO THE PROCEEDING

Petitioner, Eric Lynn Self, is a resident of Weiner, Arkansas. He was the plaintiff in the lower court proceedings of this case and was the appellant before the United States Court of Appeals for the Eighth Circuit.

Respondents, Auburn Steel Company, Inc., Sumitomo Corporation of America, SC Steel Investment, Inc., and Yamato Kogyo (U.S.A.) Corporation, are an association of partners d/b/a Arkansas Steel Associates.

There are no other parties to this action.

TABLE OF CONTENTS

Page

Question Presented for Review i

Parties to the Proceeding ii

Table of Contents iii

Table of Authorities iv

Opinions Below 1

Statement of Jurisdiction 2

Statute Involved 2

Statement of the Case 3

Reason for Granting the Writ 4

CERTIORARI SHOULD BE GRANTED TO DETERMINE A CASE OF FIRST IMPRESSION WITH THIS COURT AND A QUESTION OF LAW. IT IS ALSO ARGUED THAT THE CIRCUITS ARE SPLIT ON WHETHER THE ADEA AFFORDS AN EMPLOYEE STANDING FOR RETALIATION BASED ON THE EMPLOYEE'S FATHER HAVING PREVIOUSLY BROUGHT AN ADEA ACTION AGAINST THE SAME EMPLOYER.

Conclusion 19

Appendices Contents . . . . . ia

Appendices 1a

TABLE OF AUTHORITIES

Cases:

Albemarle Paper Co. v. Moody,
422 U.S. 405, 419-22, 95 S.Ct. 2362, 2372-74,
45 L.Ed.2d 280 (1975) 10

Asklar v. Honeywell, Inc., 95 F.R.D. 419
(D. Conn. 1982) 5,6,18

Bailey v. USX Corp., 850 F.2d 1506
(11th Cir. 1988) 12,15

Brock v. Casey Truck Sales, Inc., 839 F.2d 872, 879
(2d Cir. 1988) 14

Clark v. R. J. Reynolds Tobacco Co.,
27 FEP 1628, 1982 WL 2277 (E.D. La. 1982) 11

DeMedina v. Reinhardt, 444 F.Supp. 573 (D.C. 1978),
aff'd in part and remanded in part,
686 F.2d 997 (D.C. Cir. 1982) 8,16

Dunlop v. Carriage Carpet Co., 548 F.2d 139
(6th Cir. 1977) 13,14,15

EEOC v. Ohio Edison Co., 7 F.3d 541
(6th Cir. 1993) 7,16,18

Holt v. JTM Industries, 71 FEP Cases 809
August 7, 1996, U.S. Court of Appeals,
5th Cir. 16,18

Kornbluh v. Stearns & Foster Co., 73 F.R.D. 307, 312
(S.D. Ohio 1976) 9,11

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-6,
112 S.Ct. 2130, 2136, 110 L.Ed.2d 351 (1992) . . . 17

Mandia v. Arco Chemical Co., 618 F.Supp. 248
(1985) 11,17

Mitchell v. Robert DeMario Jewelry, Inc.,
361 U.S. 288, 292, 80 S.Ct. 335, 335,
4 L.Ed2d 323 (1960) 12

NLRB v. Retail Store Employees Union, Local 876,
570 F.2d 586 (6th Cir.), *cert denied*, 439 U.S. 819,
99 S.Ct. 81, 58 L.Ed.2d 109 (1978) 14

NLRB v. Scrivener, 405 U.S. 117, 92 S.Ct. 798,
31 L.Ed.2d 79 (1972) 15

Pantchenko v. C. B. Dolge Co., 581 F.2d 1052, 1055
(2d Cir. 1978) 13

Passer v. American Chemical Society, 935 F.2d 322
(D.C. Cir. 1991) 12,15

Rutherford v. American Bank of Commerce,
565 F.2d 1162, 1165-66 (10th Cir. 1977) 13

United States v. City of Socorro, 25 FEP 815,
1976 WL 523 (D.N.M. 1976) 11

Statutes:

28 U.S.C. § 1254(1) 2

29 U.S.C. § 215(a)(3) 12

29 U.S.C. § 621 et seq. 3

29 U.S.C. § 623(d) 2,3,5,6,12

29 U.S.C. § 626(c)(1) 16

42 U.S.C. § 2000e-2(a) 3

42 U.S.C. § 2000e-3(a) 6,7,8,9,11,12,15

Acts:

Age Discrimination in Employment Act of 1967 2,3,4,6,12,16,18,19

Civil Rights Act of 1964 3,6,7,9,10,11,12,13,15,17

Fair Labor Standards Act 12,13,14

National Labor Relations Act 13,14

Rules and Regulations:

FRAP Rule 4 6

No. _____

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1996

ERIC LYNN SELF,

Petitioner,

vs.

AUBURN STEEL COMPANY, INC.,
SUMITOMO CORPORATION OF AMERICA,
SC STEEL INVESTMENT, INC., and
YAMATO KOGYO (U.S.A.) CORPORATION
d/b/a ARKANSAS STEEL ASSOCIATES,
an association of partners,

Respondents.

Petition for Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

On June 6, 1997, the United States Court of Appeals for the Eighth Circuit issued its opinion, affirming the decision of the United States District Court for the Eastern District of Arkansas. That opinion was not recommended for publication.

The opinion of the United States Court of Appeals for the Eighth Circuit is reproduced in the Appendix at App. 1a.

The Orders of the United States District Court for the Eastern District of Arkansas are reproduced in the Appendix beginning at App. 4a, 6a and 8a.

STATEMENT OF JURISDICTION

Petitioner seeks review of the opinion of the United States Court of Appeals for the Eighth Circuit and its judgment filed June 6, 1997. That judgment affirmed the lower court's granting summary judgment in favor of Respondent.

Petitioner invokes the certiorari jurisdiction conferred on this Court by 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The ADEA prohibits an employer from discriminating against an employee or applicant for employment who

> has opposed any practice made unlawful by [the ADEA], or because such individual . . . has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under [the ADEA]. 29 U.S.C. § 623(d) (1997).

STATEMENT OF THE CASE

Eric Lynn Self, a 39-year-old male, an employee of Respondents since 1989, filed his claim for retaliation under the ADEA based on adverse acts Respondents admit they committed against Petitioner which might be considered as adverse. Petitioner's father, E. L. Self, had filed an ADEA claim against the Respondents previously for failure to hire.

Petitioner alleged that Respondents had treated him differently than other employees by moving his work station to another area near a chemical vat in a building far from his regular work station, treated him differently concerning sick pay and leaves of absence, and refusing to provide Petitioner with timely evaluations pursuant to Respondent's own policy which had the effect of limiting Petitioner's income. Although Petitioner was paid by the hour, the inconvenience of hauling tools and materials from the area where he originally worked to the new area caused a reduction in production by Petitioner.

Petitioner sued Respondents in January 1996 on the theory that certain employment actions affecting him were in retaliation for his father's participation in a 1991 lawsuit against the Respondents under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 et seq. (1997). Petitioner's complaint mistakenly alleged a violation of the retaliation provision of Title VII. Title VII makes it unlawful for employers to discriminate on the basis of race, sex, color, national origin, or religion, *see* 42 U.S.C. § 2000e-2(a).

The district court dismissed Petitioner's claim under Title VII, 42 U.S.C. § 2000-e2(a) but went on to consider his claim as if he had brought it under the ADEA, 29 U.S.C. § 623(d) (1997).

The district court granted Respondent's motion for summary judgment, holding that Petitioner had no standing to sue for any alleged retaliation as a result of his father's previous ADEA complaint.

The district court also denied Petitioner's motion to amend complaint, without prejudice, which had attempted to add additional retaliatory acts committed by Respondents since Petitioner had filed his original EEOC Charge.

Petitioner filed two separate motion's to reconsider which the district court denied.

Petitioner appealed the district court's granting of Respondent's motion for summary judgment. The Court of Appeals for the Eighth Circuit affirmed the holding of the district court on June 6, 1997 in an unpublished opinion.

Petitioner now seeks the review of this Court.

REASON FOR GRANTING THE WRIT

CERTIORARI SHOULD BE GRANTED TO DETERMINE A CASE OF FIRST IMPRESSION WITH THIS COURT AND A QUESTION OF LAW. IT IS ALSO ARGUED THAT THE CIRCUITS ARE SPLIT ON WHETHER THE ADEA AFFORDS AN EMPLOYEE STANDING FOR RETALIATION BASED ON THE EMPLOYEE'S FATHER HAVING PREVIOUSLY BROUGHT AN ADEA ACTION AGAINST THE SAME EMPLOYER.

Because 29 U.S.C. § 623(d) fails to specifically state that a relative has standing based on the relationship alone, the intent of Congress in passing the ADEA is relevant.

The intent of Congress in passing the ADEA has been discussed in other cases concerning issues of standing by relatives in matters very similar in nature to the case at bar.

In Asklar v. Honeywell, Inc., 95 F.R.D. 419 (D. Conn. 1982), the court held that one of the primary purposes of the ADEA is to redress individual wrongs, that recovery in the form of damages obviously runs to the individual, and that recovery is to be based on the demonstrated loss and thus is not disproportionate to the harm suffered.

In Asklar, supra, whether the person claiming standing by virtue of the relationship to the original claimant, the court hinges its decision on whether that person was an employee of the defendant.

In Asklar, a former employee's widow and legal representative moved for substitution for leave to amend her complaint to reflect her substituted status, and for permissive intervention in former employee's ADEA claim. Although the court ruled a former employee's ADEA claim survived his death and was subject to revival by his legal representative, the court stated the widow lacked standing to bring a personal action under the retaliatory section because she was neither an employee or an applicant for employment.

The court in Asklar discusses two threshold issues: (1) Whether an action under the ADEA survives the death of the original plaintiff; and (2) Whether a person who is not an employee of the defendant employer has standing to assert a claim of retaliation under § 623(d) of the ADEA.

As to the first issue, the court reasoned that "whether a claim abates or is subject to revival by a proper party is a question of substantive law and is not answered by the procedural Rule 25(a) alone."

The court in Asklar discussed the plaintiff's widow's attempt to bring her own personal action under 29 U.S.C. § 623(d). The court denied standing stating, "Mrs. Asklar has never been an employee or an applicant for employment at Honeywell, nor is there any claim that she has been denied employment with the defendant because of retaliatory motivation."

It is undisputed that Petitioner's father previously filed an ADEA claim against Respondents, that Petitioner is an employee of Respondents, and Respondents admit doing acts against the Petitioner which are contra to his interests.

Petitioner's retaliation claims have a nexus in his father's ADEA claim against Respondents for failure to hire. The same seeds of discrimination sown by Respondents are continuing to germinate with the actions taken against Petitioner.

The causal link required by the Civil Rights Act of 1964 § 704(a), 42 U.S.C.A. § 2000e-3(a), between Petitioner's protected activity and the adverse action of Respondents is the father-son relationship between Petitioner and his father, who had previously filed an ADEA claim.

Petitioner has no more control over his relationship to his relatives than any other person has control over his age, race, or sex.

In E.E.O.C. v. Ohio Edison Co., 7 F.3d 541 (6th Cir. 1993), the central issue was whether a black employee had standing to allege retaliation for the acts committed by another black employee. The court discussed issues of standing thoroughly and the court's opinion is repeated in part as follows:

> In order to succeed on claim of retaliation, plaintiff must show that he engaged in activity protected by Title VII, that he was subject of adverse employment action, and that there exists casual link between his protected activity and adverse action of his employer. Civil Rights Act of 1964, § 704(a), 42 U.S.C.A. § 2000e-3(a).
>
> Employer may not discriminate against employee because employee opposed unlawful employment practice, or made charge, or participated in investigation, proceeding, or hearing related to Title VII. Civil Rights Act of 1964, 704(a), 42 U.S.C.A. § 2000e-3(a).
>
> Title VII section prohibiting discrimination by employer against employee because employee has 'opposed any practice' should be broadly construed to include claim in which employee, or his representative, has opposed any unlawful employment practice. Civil Rights Act of 1964, 704(a), 42 U.S.C.A. § 2000e-3(a).
>
> . . . In several cases, courts have found that if an employer retaliated against a close relative of the person engaging in protected

activity, the relative may bring a claim under 42 U.S.C. § 2000e-3(a), even though the relative was not the person engaging in the protected activity. The leading case is DeMedina v. Reinhardt, 444 F.Supp. 573 (D.C. 1978), *aff'd in part and remanded in part*, 686 F.2d 997 (D.C. Cir. 1982), in which a former employee asserted a claim based on allegations that she was discriminated against by the employer in reprisal for the antidiscriminatory activities of her husband. The court in DeMedina reasoned as follows:

> It is . . . necessary to consider [the employer's] defendant's argument that since plaintiff is not the person whose protected activities are allegedly being impeded by defendant's retaliatory actions, plaintiff fails to state a claim upon which relief can be granted under 42 U.S.C. §2000e-3. Section 2000e-3 provides:
>
> "It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made unlawful employment practice by this title, or because he has made a charge, testified, assisted, or partici-

pated in any manner in an investigation, proceeding, or hearing under this title."

While the language of this section indicates that Congress did not expressly consider the possibility of third-party reprisals -- i.e., discrimination against one person because of a friend's or relative's protected activities--the very clear intent of Congress would be undermined by the construction defendant suggests. In enacting section 2000e-3, Congress unmistakably intended to ensure that no person would be deterred from exercising his rights under Title VII by the threat of discriminatory retaliation. Since tolerance of third-party reprisals would, no less than the tolerance of direct reprisals, deter persons from exercising their protected rights under Title VII, the Court must conclude, as has the only other court to consider the issue, Kornbluh v. Stearns & Foster Co., 73 F.R.D. 307, 312 (S.D. Ohio 1976), that section 2000e-3 proscribes the alleged retaliation of which plaintiff complains. Defendant finally

argues that even if defendant's actions that plaintiff alleges are retaliatory are proscribed by the Act, plaintiff's husband, and *not* plaintiff, is the only person who can seek relief on this claim, [because plaintiff's husband was the one who engaged in the protected activity]. Such a construction of Title VII would produce absurd and unjust results, for while plaintiff's husband might be in a position to seek injunctive relief to prohibit future reprisals against his spouse, he would certainly not be in a position to seek back pay and/or retroactive promotion based on his spouse's employment denial. Thus, unless plaintiff herself is permitted to seek relief based on the denial of her employment application, the 'make whole' purpose of Title VII would be frustrated. Such a result would contravene the express legislative history of Title VII, see Albemarle Paper Co. v. Moody, 422 U.S. 405, 419-22, 95 S.Ct. 2362, 2372-74, 45 L.Ed.2d 280 (1975), and would be unacceptable to this Court. Accordingly, the Court

> holds that plaintiff's allegation of reprisal for her husband's anti-discrimination activities at the USIA states a claim upon which relief can be granted under Title VII.

Id. at 580-81.

We agree with the reasoning of the DeMedina court that a plaintiff's allegation of reprisal for a relative's antidiscrimination activities state a claim upon which relief can be granted under Title VII.[1] We thus reject the conclusion of the district court in the present case that third parties, who have not actually engaged in protected activities themselves, can never sue under 42 U.S.C. § 2000e-3(a). Even though the statute does not specifically provide for such a claim by a relative who has been discriminated against,

---

[1]See also Clark v. R. J. Reynolds Tobacco Co., 27 FEP 1628, 1982 WL 2277 (E.D. La. 1982) (a prima facie case under 42 U.S.C. § 2000e-3(a) is established if it is alleged that the charging party "was statutorily protected from retaliation by the defendant by being the relative of an employee who has engaged in a statutorily protected activity"); United States v. City of Socorro, 25 FEP 815, 1976 WL 523 (D.N.M. 1976) (Act was violated when husband was threatened because his wife was engaging in protected activities); Kornbluh v. Stearns & Foster Co., 73 F.R.D. 307 (S.D. Ohio 1976) (plaintiff entitled to be heard on issue of retaliatory discharge because of his wife's lawful engagement in picketing the employer); Mandia v. Arco Chemical Co., 618 F.Supp. 1248 (W.D. Pa. 1985) (42 U.S.C. § 2000e-3 would proscribe retaliation against third party because close relative filed Title VII complaint).

the majority of courts, including the Supreme Court, have been willing to construe Title VII and companion provisions under the Fair Labor Standards Act, 29 U.S.C. § 215(a) (3), and the Age Discrimination Employment Act (ADEA), 29 U.S.C. § 623(d), broadly in order not to frustrate the purpose of these Acts, which is to prevent fear of economic retaliation from inducing employees "quietly to accept [unlawful] conditions." See Mitchell v. Robert DeMario Jewelry, Inc., 361 U.S. 288, 292, 80 S.Ct. 335, 335, 4 L.Ed.2d 323 (1960). In Passer v. American Chemical Society, 935 F.2d 322 (D.C. Cir. 1991), for example, the D.C. Circuit held that a former employee could maintain an action under the ADEA's antiretaliation provision. The court noted that the language of the statute, by its terms, barred retaliation "only against 'employees or applicants for employment.'" *Id.* at 330. The court ruled, nonetheless, that the statute must be read to apply to former employees because "[t]o read the statute otherwise would be to deny protection to any person who has suffered discharge or termination due to unlawful discrimination." *Id.* at 331. The court emphasized that Congress "could not have intended such an absurd result." *Id.*

Similarly, in Bailey v. USX Corp., 850 F.2d 1506 (11th Cir. 1988), the Eleventh Circuit held that a former employee had standing to sue under Section 704(a) of the Title VII, 42 U.S.C. § 2000e-3(a), for

retaliatory discharge. The court acknowledged that the plain language of the statute might be read to exclude former employees from the protection of the statute because the statute says "employees or applicants for employment" and does not include an ex-employee, but found that "a strict and narrow interpretation of the word 'employee' to exclude former employees would undercut the obvious remedial purposes of Title VII." *Id.* at 1509. The court determined that the "plain-meaning rule should not be applied to produce a result which is actually inconsistent with the policies underlying the statute." *Id.*; see also Pantchenko v. C.B. Dolge Co., 581 F.2d 1052, 1055 (2d Cir. 1978); Rutherford v. American Bank of Commerce, 565 F.2d 1162, 1165-66 (10th Cir. 1977). We believe this is what the district court in the present case has done--applied the plain meaning rule to produce a result inconsistent with the policies underlying the statute.

While this court has not addressed this issue under Title VII, it has adopted the same interpretative strategy in construing the related provisions of the National Labor Relations Act (NLRA) and Fair Labor Standards Act (FLSA). In Dunlop v. Carriage Carpet Co., 548 F.2d 139 (6th Cir. 1977), for instance, this court held that former employees were protected by the FLSA's antiretaliation prohibition even though the statute, by its terms, only applied to individuals "'employed by an employer.'" *Id.* at 142. The Sixth

Circuit in Dunlop emphasized that "[t]o hold otherwise would do violence to the Congressional intent and purposes of the Act and would prejudice the effective enforcement of the Act." *Id.* at 147. In NLRB v. Retail Store Employees Union, Local 876, 570 F.2d 586 (6th Cir.), *cert. denied*, 439 U.S. 819, 99 S.Ct. 81, 58 L.Ed2d 109 (1978), this court applied a similar analysis in holding that the antiretaliation provision of the NLRA prohibited an employer from firing an employee who refused to testify at a Board hearing despite the fact that the statute, by its terms, applied only to employees who had "filed charges or given testimony," and literally did not deal with a refusal to give testimony. *Id.* at 590. The court stressed that the purpose of the antiretaliation provision "was to ensure that all persons with information about unfair labor practices 'be completely free from coercion against reporting them to the Board.'" *Id.*; see also Brock v. Casey Truck Sales, Inc., 839 F.2d 872, 879 (2d Cir. 1988) (observing that because the FLSA's retaliation provision plays an important role in "'foster[ing] a climate in which compliance with [the FLSA's] substantive provisions . . . would be enhanced,'" courts have "not hesitated to apply the protection [of the provision] to activities less directly connected to formal proceedings where retaliatory conduct has a similar chilling effect on employees' assertion of rights").

Thus, the D.C. Circuit in Passer and the Eleventh Circuit in Bailey did not feel constrained by a narrow reading of Title VII, 42 U.S.C. § 2000e-3(a) and interpreted the word "employee" to include the claim of an "ex-employee" as did this circuit in Dunlop under the Fair Labor Standards Act. This gives precedence to the argument that the anti-retaliation provision of an employment statute should not be construed narrowly if it defeats the purpose of the statute. Moreover, this court has construed the phrase "given testimony" in a related statute broadly to include a claim for a refusal to testify. Most significantly, the Supreme Court in NLRB v. Scrivener, 405 U.S. 117, 92 S.Ct. 798, 31 L.Ed.2d 79 (1972) held that the language of a statute should not be read strictly, but should "be read more broadly" if such a reading was also consistent with the "purpose and objective" of the prohibition made illegal by the statute. *Id.* at 122, 92 S.Ct. at 801-02. In the present case, we believe the phrase "he has opposed any practice" should be construed broadly to mean "he or his representative has opposed any practice," because it is consistent with the objective of the Act which is to prohibit retaliation against protected activity. The district court's restrictive interpretation of 42 U.S.C. § 2000e-3(a) would allow an employer to retaliate with impunity if someone engaged a representative to act on his behalf and would frustrate the Act's purpose to prevent retaliation for opposing unlawful employment practices.

> As the cases previously cited indicate, courts have routinely adopted interpretations of retaliation provisions in employment statutes that might be viewed as outside the literal terms of the statute in order to effectuate Congress's clear purpose in proscribing retaliatory activity. Contrary to defendant's assertions, courts have frequently applied the retaliation provisions of employment statutes to matters not expressly covered by the literal terms of these statutes where the policy behind the statute supports a non-exclusive reading of the statutory language.

Admittedly in Holt v. JTM Industries, 71 FEP Cases 809, August 7, 1996, a U.S. Court of Appeals, Fifth Circuit case, the court held that the husband who is retaliated against because his wife engaged in a protected activity does not have automatic standing to sue for retaliation simply because of the spousal relationship. The majority opinion acknowledges that it took this position because in most cases a close friend or spouse will have participated in some way in the protected activity and standing because of the relationship will not be necessary. The court acknowledges that there is little law in this area except for the case of EEOC v. Ohio Edison Co., supra, which has been cited extensively above, and also DeMedina v. Reinhardt, supra.

James L. Dennis, Circuit Judge in Holt v. JTM Industries, supra, wrote a stinging dissenting opinion. In summary, Judge Dennis cited Section 7(c) of the ADEA which provides that "*[a]ny person aggrieved* may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this Act..." 29 U.S.C. § 626(c)(1) (emphasis supplied).

Judge Dennis further described the three-part test the U.S. Supreme Court has formulated to determine whether the plaintiff has standing for purposes of Article III. First, there must be an actual or threatened injury, second, that is traceable to the conduct of the defendant, and third, is likely to be redressed by a favorable judicial decision. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61, 112 S.Ct. 2130, 2136, 110 L.Ed2d 351 (1992).

Time constraints prohibit the complete descent of Judge Dennis.

Finally, Mandia v. Arco Chemical Co., 618 F.Supp. 248 (1985), supports Plaintiff's position. In Mandia, supra, the U.S. District Court, Western District of Pennsylvania, held that Section 704 of the Civil Rights Act of 1964 proscribes retaliation against a third party because of filing of an EEOC charge by a close relative.

The court further held that the test in retaliation cases is whether a charging party had reasonable belief that employment practice violated Title VII and not whether the EEOC charge has merit.

Although the court in Mandia found that the plaintiff failed to prove that he was terminated because his wife filed EEOC charges alleging sexual harassment, the court decided the case on the merits.

Mark Lindsey, a supervisor of Petitioner, and Dan Haygood, manager of human resources, both commended Petitioner in his work skills, attitude toward his work, and personality in general. Respondent can give no rational reason for the discriminatory treatment of a respected, competent employee. Respondent has admitted committing

adverse acts against Petitioner's interest.

A clue to Respondent's motives for the ill treatment of Petitioner is contained in Petitioner's own position statement. Respondent acknowledges through its counsel that Respondent has to eat crow every day that Petitioner is on the job. In the position statement, Respondent states, "Mr. Self does have a predisposition to frequently comment about the perceived significance of the outcome of the aforementioned case (Petitioner's father's ADEA claim), sometimes in a rather boastful manner." Although this is contrary to what Petitioner's own supervisors, Mark Lindsey and Dan Haygood, have said about Petitioner, this statement by Respondent's counsel gives valuable insight into Respondent's motives and treatment of Petitioner.

The retaliation described above is exactly the kind of acts that the court in EEOC and Judge Dennis in Holt interpreted the ADEA as preventing.

The primary purpose of the ADEA is to redress individual wrongs and that recovery in the form of damages obviously runs to the individual. Asklar v. Honeywell, Inc., supra.

The lower court hinged its decision in denying Petitioner standing on the fact that Petitioner did not "participate in" a proceeding under the ADEA. The extent of Petitioner's participation in his father's ADEA claim was limited to the biological relationship, a son of his father, E. L. Self.

The courts have no problem in finding discrimination has occurred when the plaintiff is either black, a female, or in the protected age group, between the ages of 40 and 72. No other "participation" is required other than falling within

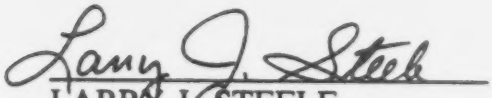
the proper category. For the lower court to require some additional overt act would circumvent the intent of Congress pursuant to the retaliatory section of the ADEA.

In sum, there is a variance of opinion on a matter of importance to the courts and to the people. This case presents an opportunity for this Court to address the arguably disputed issue and to bring uniformity to the ADEA law.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,



LARRY J. STEELE
Attorney for Petitioner
P.O. Box 561
Walnut Ridge, AR 72476-0561
(870) 886-5840

APPENDICES

Page

Appendix A Opinion of the United States Court of Appeals for the Eighth Circuit Filed June 6, 1996 . . . . . 1a

Appendix B Order of the United States District Court for the Eastern District of Arkansas filed November 19, 1996 . . . . . 4a

Appendix C Order of the United States District Court for the Eastern District of Arkansas filed November 13, 1996 . . . . . 6a

Appendix D Order of the United States District Court for the Eastern District of Arkansas filed October 31, 1996 . . . . . 8a

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 96-4102

Eric Lynn Self,	*	
	*	
Plaintiff/Appellant,	*	
	*	Appeal from the
v.	*	United States District
	*	Court for the Eastern
Auburn Steel Company, Inc.;	*	District of Arkansas.
Sumitomo Corporation of	*	
America; SC Steel Investment,	*	[UNPUBLISHED]
Inc.; Yamato Kogyo (U.S.A.)	*	
Corporation, doing business	*	
as Arkansas Steel Associates,	*	
an association of partners,	*	
	*	
Defendants/Appellees.	*	

Submitted: May 22, 1997
Filed: June 6, 1997

Before MURPHY, HEANEY, and MAGILL, Circuit Judges.

PER CURIAM.

Eric Self sued his employer, Auburn Steel Company, in January 1996 on the theory that certain employment actions affecting him were in retaliation for his father's participation in a 1991 lawsuit against the company under the Age Discrimination Employment Act (ADEA), 29 U.S.C. § 621 et seq. (1997). The district court[1] granted summary judgment for Auburn Steel, and we affirm.

Self's complaint alleged a violation of the retaliation provision of Title VII. Title VII makes it unlawful for employers to discriminate on the basis of race, sex, color, national origin, or religion, see 42 U.S. C. § 2000e-2(a), and it prohibits an employer from retaliating against an employee on the basis that

> he has opposed any practice made an unlawful employment practice by [Title VII], or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under [Title VII].

42 U.S.C. § 2000e-3(a) (1997). Self made no factual allegations and produced no evidence related to a case alleging discrimination on the basis of race, sex, color, religion or national origin. The district court was therefore correct in dismissing this claim.

Sometime after his complaint was filed Self moved to amend it to include a cause of action for retaliation under the ADEA. The ADEA prohibits an employer from discriminating against an employee or applicant for employment who

---

[1]The Honorable William R. Wilson, United States District Judge for the District of Eastern Arkansas.

> has opposed any practice made unlawful by [the ADEA], or because such individual . . . has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under [the ADEA].

29 U.S.C. § 623(d) (1997). The district court denied the motion to amend without prejudice, but went on to consider his claim as if he had brought it under the ADEA.[2]

Assuming the ADEA retaliation claim is properly before us, we conclude that the district court did not err in granting summary judgment in favor of Auburn Steel because Self failed to produce evidence sufficient to show a claim under 29 U.S.C. § 623(d).

The judgment of the district court is affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS
FOR THE EIGHTH CIRCUIT.

[Filed June 6, 1997]

---

[2]Self indicated in his notice of appeal that he was not appealing that portion of the court's order which denied his motion to amend.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OR ARKANSAS
JONESBORO DIVISION

ERIC LYNN SELF PLAINTIFF

VS. J-C-96-8

AUBURN STEEL COMPANY, INC.,
SUMITOMO CORPORATION OF AMERICA,
SC STEEL INVESTMENT, INC., and YAMATO
KOGYO (U.S.A.) CORPORATION d/b/a
ARKANSAS STEEL ASSOCIATES,
an association of partners DEFENDANTS

ORDER

This Court entered an Order granting summary judgment in favor of Defendants on October 31, 1996. In granting summary judgment, the Court held that Plaintiff had no standing to sue under the ADEA for retaliation as a result of his father's ADEA complaint since he "candidly conceded" that he did not participate in his father's ADEA proceeding. On November 13, 1996, the Court denied Plaintiff's Motion for Reconsideration. On November 14, 1996, Plaintiff's counsel submitted a letter brief to the Court, once again asking for reconsideration of the October 13, 1996 Order.

Attached to Plaintiff's letter brief is an Affidavit of Plaintiff, wherein he effectively changes his story regarding the alleged retaliation he suffered based upon his father's ADEA claim. While Plaintiff previously stated in his deposition and Statement of Undisputed Facts that he "did not

participate in any manner in either the EEOC charge or the lawsuit filed by his father and others," in his most recent Affidavit, Plaintiff now claims that there have been some "participation in" his father's ADEA proceeding.

For the Court to consider these statements at this point would effectively allow Plaintiff three bites at the proverbial apple. What has apparently taken place is that Plaintiff now recognizes the requirements necessary to bring an ADEA retaliation claim and has submitted an Affidavit in this regard. Based upon the law cited in the previous two Orders addressing this issue, Plaintiff now alleges facts arguably consistent with the legal requirements of an ADEA retaliation claim. To allow Plaintiff to allege new facts after the Court has twice explained why Plaintiff has no claim would be wholly unfair to Defendants. To afford any plaintiff this opportunity would allow plaintiffs the right to restructure their claims with the benefit of a Court's ruling on the issue.

Accordingly, this Court affirms its October 31, 1996 Order as well as its November 13, 1996 Order in concluding that Plaintiff has no standing to bring suit under the ADEA for alleged retaliatory acts as a result of his father's ADEA claim.

IT IS SO ORDERED this 8th day of November, 1996.

/s/ William R. Wilson
UNITED STATES DISTRICT JUDGE

[Filed November 19, 1996]

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OR ARKANSAS
JONESBORO DIVISION

ERIC LYNN SELF — PLAINTIFF

VS. J-C-96-8

AUBURN STEEL COMPANY, INC., SUMITOMO CORPORATION OF AMERICA, SC STEEL INVESTMENT, INC., and YAMATO KOGYO (U.S.A.) CORPORATION d/b/a ARKANSAS STEEL ASSOCIATES, an association of partners — DEFENDANTS

ORDER

Pending before the Court is Plaintiff's Motion to Reconsider. For the reasons set forth below the motion is denied.

Plaintiff asks the Court to reconsider its October 31, 1996 Order granting summary judgment in favor of Defendants. Plaintiff asks the Court to reconsider its ruling that Plaintiff does not have standing under the ADEA to sue his employer for retaliation allegedly based upon Plaintiff's father's previous ADEA claim. As in his response to the summary judgment motion, Plaintiff relies on *EEOC v. Ohio Edison Co.*, 7 F.3d 541 (6th Cir. 1993), for the proposition that Plaintiff has standing simply because of his "relationship" to his father.

As this Court stated in its Order granting summary judgment, there may be certain situations where a relative or close acquaintance may have standing to sue for retaliation based upon an ADEA claim brought by someone else, but the threshold question is whether or not the party allegedly discriminated against actually "participated in" the ADEA proceeding. While the *Ohio Edison* court did find the plaintiff had standing, the court also specifically noted that the plaintiff protested the allegedly unlawful discharge of a co-employee, and, therefore, actually "participated in" events surrounding the co-employee's ADEA claim. Plaintiff candidly concedes that he took no affirmative action on his father's behalf with respect to his father's ADEA claim. Had Plaintiff done so, perhaps the decision of this Court would be different. This Court is not saying that a plaintiff never has standing to bring a retaliation claim based upon the ADEA claims brought by others, but merely that under the facts of this case, no standing exists.

Accordingly, the Court stands by its October 31, 1996 Order and Plaintiff's Motion to Reconsider is denied.

IT IS SO ORDERED this 12th day of November, 1996.

/s/ William R. Wilson
UNITED STATES DISTRICT JUDGE

[Filed November 13, 1996]

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OR ARKANSAS
JONESBORO DIVISION

ERIC LYNN SELF PLAINTIFF

VS. J-C-96-8

AUBURN STEEL COMPANY, INC.,
SUMITOMO CORPORATION OF AMERICA,
SC STEEL INVESTMENT, INC., and YAMATO
KOGYO (U.S.A.) CORPORATION d/b/a
ARKANSAS STEEL ASSOCIATES,
an association of partners DEFENDANTS

ORDER

Pending before the Court is Defendants' Motion for Summary Judgment. For the reasons set forth below the motion is granted.

In their summary judgment motion, the defendants essentially assert two grounds for dismissal. First, Defendants claim that the plaintiff, Eric Lynn Self, has no standing to sue for alleged retaliation because Plaintiff's father filed an ADEA claim. Second, Defendants contend that the plaintiff has not, and cannot, show that certain alleged discriminatory acts were related to Plaintiff's race, sex, color, national origin or religion, as required under actions brought pursuant to Title VII.

STANDARD FOR SUMMARY JUDGMENT

Summary judgment is appropriate only when there is

no genuine issue of material fact, so that the dispute may be decided solely on legal grounds. *Holloway v. Lockhart*, 813 F.2d 874 (8th Cir. 1987); Fed. R. Civ. P. 56. The Supreme Court has established guidelines to assist trial courts in determining whether this standard has been met:

> The inquiry is the threshold inquiry of determining whether there is a need for trial -- whether, in other words, there are genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party.

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986).

The Eighth Circuit Court of Appeals has cautioned that summary judgment should be invoked carefully so that no person will be improperly deprived of a trial of disputed factual issues. *Inland Oil & Transport Co. v. United States*, 600 F.2d 725 (8th Cir. 1979), *cert. denied*, 444 U.S. 991 (1979). The Eighth Circuit set out the burden of the parties in connection with a summary judgment motion in *Counts v. M.K. Ferguson Co.*, 862 F.2d 1338 (8th Cir. 1988):

> [T]he burden on the moving party for summary judgment is only to demonstrate, *i.e.*, '[to] point out to the District Court,' that the record does not disclose a genuine dispute on a material fact. It is enough for the movant to bring up the fact that the record does not contain such an issue and to identify that part of the record which bears out his assertion. Once this is done, his burden is discharged, and if the record in fact bears out the claim that no genuine dispute exists on any material

> fact, it is then the respondent's burden to set forth affirmative evidence, specific facts, showing that there is a genuine dispute on that issue. If the respondent fails to carry that burden, summary judgment should be granted.

Id. at 1339. (quoting *City of Mt. Pleasant v. Associated Elec. Coop.*, 838 F.2d 268, 273-274 (8th Cir. 1988) (citations omitted) (brackets in original).

Only disputes over facts that may affect the outcome of the suit under governing law will properly preclude the entry of summary judgment. *Anderson*, 477 U.S. at 248.

STANDING

A. RETALIATION BASED UPON PLAINTIFF'S FATHER'S ADEA CLAIM

It should be noted on the front end that the Plaintiff's Complaint erroneously alleges a retaliation claim pursuant to 42 U.S.C. §2000e-3(a). The plaintiff, however, has filed a Motion to Amend Complaint, seeking to amend the Complaint to bring his claims of retaliation pursuant to 29 U.S.C. §623(d), the proper statute. Although that motion is denied, as will be discussed below, the Court considered the summary judgment motion as if the retaliation claim had been brought pursuant to the proper statute, 29 U.S.C. §623(d).[1]

---

[1]In Plaintiff's Complaint, he alleges retaliation pursuant to 42 U.S.C. §2000e-3(a). In order for Plaintiff to succeed on a Title VII retaliation claim, he must be able to show that he either opposed an unlawful employment practice protected by Title VII, or that he participated in an investigation, proceeding, or hearing under Title VII. Because Plaintiff's father's claim was brought pursuant to the ADEA, a retaliation claim pursuant to Title VII is inapplicable.

With respect to standing, the Court agrees with Defendants that Plaintiff has no standing to sue for any alleged retaliation as a result of his father's ADEA complaint. In *Holt v. JTM Industries*, 71 FEP Cases 809 (5th Cir. 1996), the Plaintiff brought a retaliation claim pursuant to 29 U.S.C. §623(d) of the ADEA.[2] The Plaintiff in *Holt* claimed that he was discriminated against by his employer because his wife had filed an age discrimination charge against the same employer. In a well-reasoned discussion of §623(d), the Fifth Circuit held that, under certain circumstances, a plaintiff may have standing to sue for retaliation for a relative's, or close acquaintance's, protected activities. The Court, however, limited its holding to circumstances where the relative or close friend actually participated in the proceeding that the alleged retaliation stemmed from. In so holding, the Court stated:

> The plain language of §623(d) prohibits an employer from retaliating against an employee because "such individual" has opposed a practice prohibited by the ADEA. This section permits third parties to sue under §623(d) if they have engaged in the enumerated conduct, even if the conduct was on behalf of another employee's claim of discrimination.
>
> ***

---

[2]29 U.S.C. §623(d) provides: "It shall be unlawful for an employer to discriminate against any of his employees . . . because such individual . . . has opposed any practice made unlawful by this section, or because such individual, member or applicant for membership has made a charge, testified, assisted, or participated in any manner in any investigation, proceeding, or litigation under this chapter.

> Section 623(d) prohibits retaliation against an employee who has opposed a discriminatory practice or has participated "in any manner" in a proceeding under the ADEA.
>
> ***
>
> The plain language of §623(d) will protect these employees from retaliation for their protected activities. However, when an individual, spouse or otherwise, has not participated *"in any manner"* in conduct that is not protected by the ADEA, we hold that he does not have automatic standing to sue for retaliation under §623(d) simply because his spouse has engaged in protected activity.

Holt at 811.

The question then is whether the plaintiff actually "participated in" a proceeding under the ADEA. By the plaintiff's own admission, he has not. *(See Plaintiff's Statement of Undisputed Facts).*

Plaintiff contends that the holding of *Equal Employment Opportunity Commission v. Ohio Edison Company*, 7 F.3d 541 (6th Cir. 1993), affords standing under the facts at bar. While the Court in *Ohio Edison* found that the plaintiff had standing to sue even though he had not engaged in protected activities himself, the Court specifically found that the plaintiff was protesting the allegedly unlawful discharge of a co-employee and was acting on the co-employee's behalf when the alleged retaliation occurred. Thus, the facts in *Ohio Edison* are clearly distinguishable from the facts in this case, as there is no evidence that Plaintiff ever acted on his father's behalf in retaliation to his father's ADEA claim. In essence, the Court in *Ohio Edison*

held what the court in *Holt* held; for a plaintiff to have standing under §623(d), he must have engaged in some affirmative conduct that is tantamount to acting on behalf of the party bringing the ADEA claim. This is equivalent to the plaintiff "participating in" the protected activity.

Because the plaintiff admits that he did not participate in his father's ADEA proceeding, he has no standing to sue for retaliation based upon that proceeding. Accordingly, the plaintiff's retaliation claim based upon his father's ADEA claim will be dismissed.

B. RETALIATION REGARDING PLAINTIFF'S INFORMAL COMPLAINTS

In addition to retaliation for his father's discrimination claims, Plaintiff alleges that he was discriminated against, in violation of Title VII, as a result of informal complaints made to his employer. Specifically, Plaintiff claims he was discriminated against because he did not receive timely job performance evaluations, nor did he receive pay for business leave, personal leave, vacation and sick leave.

In order to succeed in a retaliation claim brought pursuant to Title VII, Plaintiff must be able to show: "(1) that he engaged in a statutorily protected activity; (2) an adverse employment action; and (3) a causal connection between the adverse employment action and the protected activity." *Evans v. Kansas City, Missouri School District*, 65 F.3d 98 (8th Cir. 1995); *see also Brine v. University of Iowa*, 90 F.3d 271 (8th Cir. 1996). In order to bring any claim under Title VII, Plaintiff must be able to show that the alleged discrimination was due to the Plaintiff's race, sex, color, national origin or religion. In neither Plaintiff's Complaint nor his proposed Amended Complaint has Plaintiff alleged

that the retaliation due to his informal complaints was a result of his race, sex, color, national origin or religion. It would be improper for this Court to speculate as to whether Plaintiff's claims were the result of any protected activity by Title VII. Accordingly, Plaintiff's Title VII retaliation claims regarding his informal complaints will be dismissed.

AMENDED COMPLAINT

As previously noted, Plaintiff has additionally filed a Motion to Amend Complaint, seeking to amend his original Complaint to add a retaliation claim pursuant to 29 U.S.C. §623(d), and also to add retaliatory actions allegedly taken against Plaintiff since the filing of his EEOC claim.[3] According to Defendants, these claims were not developed during discovery since they had not been pled. Further, Defendants argue that allowing the Plaintiff to amend his Complaint would prejudice them as the trial date is near at hand.[4]

In light of the fact that this trial is scheduled to begin in approximately two (2) months, and the discovery deadline and motions deadline are both within the next forty (40) days, the Court denies Plaintiff's Motion to Amend Complaint, without prejudice. *See Williams v. Little Rock Municipal Water Works*, 21 F.3d 218 (8th Cir. 1994) (permission to amend complaint may be withheld if opposing party would be unduly prejudiced).

---

[3]Plaintiff filed a charge with the EEOC on March 27, 1995 alleging violations of Title VII and the Equal Pay Act.

[4]This trial is set to begin on January 6, 1997.

CONCLUSION

As set forth above, the Defendant's Motion for Summary Judgment is granted and the Plaintiff's Motion to Amend Complaint is denied, without prejudice.

IT IS SO ORDERED this 31st day of October, 1996.

/s/ William R. Wilson
UNITED STATES DISTRICT JUDGE

[Filed October 31, 1996]